

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

WILLIAM E. SPAULDING

§

VS.

§

CIVIL ACTION NO. 5:11cv121

DIRECTOR, TDCJ-CID

§

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner William E. Spaulding, an inmate confined at the Estelle Unit, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking a prison disciplinary conviction.

The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, at Texarkana, Texas, for consideration pursuant to applicable laws and orders of this Court. The magistrate judge recommends the petition be dismissed.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation.

The magistrate judge recommended dismissal based on this petition being successive of another petition filed by petitioner, civil action no. 5:11cv120, styled *Spaulding v. Director*. Petitioner objected, asserting he is attempting to attack two separate disciplinary convictions and filed separate actions due to a misunderstanding of the relevant caselaw. Petitioner requests that the Court consolidate this matter with his other pending petition.

The Court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the Court concludes petitioner's objections are without merit and should be overruled.

The factual predicate of the claims presented in this petition were known to petitioner when he filed the previous petition; thus, this Court is without authority to entertain the petition absent prior permission from the Fifth Circuit Court of Appeals, which petitioner did not obtain. *See* 28

U.S.C. § 2244(b)(3). While the Court deems consolidation improper based on the AEDPA restrictions against filing second or successive petitions, the Court is of the opinion that the interests of justice dictate filing the petition in this action as an amendment to petitioner's other civil action.

Furthermore, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a Court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, the petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by the petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. Therefore, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. It is further

ORDERED that the Clerk of Court is **DIRECTED** to copy the original petition filed in this action and file the copy as an amended petition in civil action no. 5:11cv120, styled *Spaulding v. Director*. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations.

SIGNED this 6th day of September, 2011.

A handwritten signature in black ink, appearing to read "David Folsom", is written over a horizontal line.

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE